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No. 167

C. G. Burgoyne's Printing Co., 1419-1421 Conn. Ave. N. W.

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JAMES H. McKENNEY,
Clerk.

By of Dillon, Hubbard & Dillon
for Appellees (on mo.)

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 471.

Filed Feb. 3, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,
Appellants,
vs.
W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Memorandum on Behalf of Appellees on Motion to Advance the Case for Hearing.

Referring to the notice of motion for the advancement of this case, which motion is made by the appellants and noticed for Monday, February 5, we, as counsel for W. N. Coler & Company, the appellees, have to state that we have no objection to the advancement of this case for an early hearing. On the contrary, we join with the counsel for appellants in asking the court to advance the case.

The reasons for this request are briefly as follows, to wit:

1. This case involves, among other things, the construction of provisions in the constitution of the State of North Carolina, which provisions have been construed by the Supreme Court of that State as rendering constitutionally invalid a great number of statutes of the State under which many counties have issued negotiable bonds. Some of these decisions are mentioned in the Record, page 42. All these decisions of the Supreme Court of the State have been rendered since the bonds were issued; and, therefore, under the decisions of the Supreme Court of the United States, are not binding on the United States Courts. Not only so, but the holders of these bonds claim that, under prior decisions of the Supreme Court of the State, the statutes referred to were clearly constitutionally valid. The United States Circuit Court has refused to follow these later State Court decisions, and has held the bonds valid. There is here a conflict between the decisions of the State Courts and those of the United States Courts, which ought to be settled as early as possible.

2. Numerous cases have been brought in the State courts in which the boards of commissioners of counties of North Carolina have sought for and obtained injunctions against the treasurers of these counties forbidding the payment of interest on such bonds, in which cases the bondholders have not been parties. Bondholders have brought actions on their bonds in the United States courts, several of which actions are pending and undetermined, and the United States Cir-

cuit Court of Appeals for the Fourth Circuit has certified certain questions in this present case to this court, among others the question whether the United States courts are bound to follow these decisions of the North Carolina Supreme Court rendered after the bonds were issued. These cases in the United States courts are being held until these questions certified in this case shall have been decided by this court. Thus, for example, the United States Circuit Court of Appeals for the Fourth Circuit is now holding under advisement a petition for rehearing in the case of certain Stanly county, North Carolina, bonds until the questions certified in this case are answered by this court. So, also, the Circuit Court of the United States for the Western District of North Carolina has declined to try a case involving the validity of Buncombe county, North Carolina, refunding bonds until after the decision of this court in the present case. Thus, the trial and decision of these numerous municipal bond cases in the United States courts in North Carolina are being held to await the decision of this court in this case.

3. In the case of many of these bond issues, the county officers have for some time past either stopped the collection of taxes to pay interest thereon, or, in cases where such taxes have been collected, the moneys are held idly in the hands of the officers of the county, or in the hands of receivers appointed by the court, which is contrary both to the public welfare of the counties, and also to the interests of the numerous holders of bonds of these several counties. If these counties in North Carolina which have thus attempted

to repudiate their bonds have failed, or shall fail for a long time, to collect the necessary taxes to pay the interest, and the bonds are valid (as we believe they will finally be adjudged to be), then there will be a great amount of arrears of taxes for these counties to pay, which may be a heavy burden upon the taxpayers, imposed upon them without their fault by the action of their officers, and the counties may become financially embarrassed, and the United States Circuit Courts in North Carolina may have the unpleasant duty of enforcing mandamus proceedings to compel the taxpayers to pay such arrears. Thus, there is danger that the experience of the United States Circuit Courts in Missouri, in similar cases, may be repeated in North Carolina—a public calamity which ought to be prevented, if possible.

4. One phase of this litigation has already been before this court. There was an attempt made to bring one of these decisions of the Supreme Court of North Carolina (in a case wherein the board of county commissioners of this very county sought an injunction against the treasurer of the county forbidding the payment of interest on the county bonds) before this court on writ of error to the State Supreme Court. The bonds there in question were the very same issue of bonds that are involved in the present case. The writ of error in that case was, of course, dismissed for want of jurisdiction (*Turner vs. Wilkes County Commissioners*, 173 U. S., 461). J. M. Turner and J. M. Wellborn, claiming to own one bond, were on their own motion made parties in that case. The plaintiffs, bondholders in the present case, were not parties and had nothing to do with that case.

We therefore respectfully urge upon the court that the public good of these counties in North Carolina and their taxpayers, as well as the interests of the numerous holders of these bonds (which in any view have been issued under color of law, and which year after year have been recognized by the counties and their officers by payment of interest thereon, and in some instances by the issue of refunding bonds), require that an early hearing be had upon the matter in controversy in this case, to the end that if these bonds are held valid (as we submit they ought to be), the counties may proceed with the due collection of the taxes necessary to pay the interest thereon before burdensome arrears of taxes accumulate; and in order that the holders of the bonds be not subjected to the delays in the United States courts which at present exist in the trial and disposition of their cases as above stated.

Respectfully submitted,

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel for Appellees.

Supreme Court of the United States.

NO. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,

vs.

W. N. COLER & COMPANY.

ARGUMENT FOR W. N. COLER & COMPANY, COMPLAINANTS.

Statement of the Case.

This was a suit commenced in the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, within said district, on the 22d day of February, 1899, by W. N. Coler & Company, against The Board of Commissioners of Wilkes County, North Carolina, and others.

On the 14th day of April, 1899, there was entered a decree in favor of the complainants, which decree is set out in full on page 41 of the printed record of the certificate from the Circuit Court of Appeals for the Fourth Circuit.

After the entering of the said decree this suit was taken by appeal to the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and on the 17th day of November, 1899, the said Circuit Court of Appeals, desiring for its proper decision the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit, certified said questions or propositions of law so arising as follows (Printed record of certificate, pp. 42 and 43):

"FIRST. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits and other evidence, and matters and things recited herein, the circuit court of the United States was bound, in passing upon this case, by the decisions of the supreme court of North Carolina in the following cases:

Commissioners of Wilkes County vs. Clarence Call et al., 123 North Carolina Report, 308;

Bank vs. Commissioners, 119 N. C. Rep., 214;

Commisioners vs. Snuggs, 121 N. C. Rep., 394;

Rodman vs. Washington, 122 N. C. Rep., 39;

Commissioners vs. Payne, 123 N. C. Rep., 432;

considered in connection with prior decisions of said court and the following provisions of the constitution of said State:

"Article 2, sections 14 and 16, and article 5, sections 1, 4, 6 and 7, and article 7, section 7.

"SECOND. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"THIRD. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Caro-

lina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity."

The Circuit Court of the United States was not bound in passing upon this case by the decisions of the Supreme Court of North Carolina in the cases named in the first certified question or proposition.

The decisions above referred to were made long after the issue of the bonds and years after they had come into the hands of complainants, as set out in the bill. This fact is not denied; indeed, it is conceded.

Before proceeding further, we call the attention of the court to the fact that this case has been passed upon, at least, to some extent, by the Supreme Court of the United States. The title of the case is *Turner vs. Wilkes County Commissioners*, Volume 173 U. S. Reports, page 461.

The opinion of the court points out plainly in what cases the decisions of the State courts will be followed by the Federal courts, and is written in support of the judgment, dismissing the writ of error, for the reason that there was a want of jurisdiction of the Supreme Court, no Federal question being presented for its adjudication.

On page 463 of the volume cited Justice PECKHAM says:

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a State Court, we cannot take jurisdiction under the

allegation that a contract has been impaired by a decision of that court, when it appears that the State Court has done nothing more than construe its own Constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are, therefore, bound by the decision of the State Court, in regard to the meaning of the Constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question. *Other principles obtain when the writ of error is to a Federal Court.*"

In the same opinion, in the paragraph next to the last, is the following:

"An example of the jurisdiction exercised by this court, when reviewing a decision of a Federal Court, with regard to the same contract clause, is found in the same volume (*Folsom vs. Ninety-six*, 159 U. S. Reports, 611, 625)."

In the light of this reference to the Folsom case, we think it is natural to conclude that the facts in the case at bar suggested to that court the similarity between the two cases.

We anticipated the decision of the Court in the case of *Turner vs. Wilkes County Commissioners*, as will be seen by reference to the bill in the present case. (Paragraphs 17 and 18, on page 5 of printed certificate of record).

In the argument of the *Stanly bond case* in the Circuit Court of Appeals, very similar to this case, and to which we will call the attention of the Court in a subsequent part of this brief, we relied on the *Folsom case*, referred to by Justice PECKHAM, as decisive of it, in favor of these complainants; and we maintain here that the principles laid down in that case by Justice GRAY are the principles which should govern in the case now under discussion.

In the *Folsom case* Justice GRAY, who wrote the opinion in the case of *Post vs. Supervisors*, 105 U. S. R., 667 (the latter being cited and quoted from, in the opinion of the Circuit Court of Appeals, in support of its decision in the *Stanly case*), says:

"The first question, certified to this Court, by the Circuit Court of Appeals, is, whether upon the averments of the complaint the Circuit Court was bound in passing upon this case by the decision of the Supreme Court of South Carolina in *Floyd vs. Perrin*, 30 So. Car.."

In answer to this question this Court held *it was not bound by that case*, and the bonds were adjudicated to be valid. It is to be remarked that the Supreme Court of South Carolina had adjudged the bonds sued on in the *Folsom case* to be null and void.

If the case had been taken from the Supreme Court of South Carolina to the Supreme Court of the United States by writ of error, the latter court would have dismissed the writ, as was done in the case of *Turner vs. Wilkes Co. Commissioners*, before cited; and for the reason given in that decision, and in the case of *Central Land Co. vs. Laidley*, 159 U. S. R., page 103. It is to be noted that the same member of the Court, Justice GRAY, wrote the opinion in the *Laidley case* that wrote the opinion in the *Folsom case*, and in the case of *Post vs. Supervisors*, as before remarked.

In the *Turner and Wilkes case*, and the *Laidley case*, there had been no *legislation* by the State, impairing the obligation of a contract, which legislation was upheld by the Supreme Court of the State. Therefore, these cases being taken to the Supreme Court of the United States from the State Supreme Court under the contract clause of the Constitution, which provides

that no State shall pass any law impairing the obligation of contracts, were dismissed.

In the *Folsom Case*, the writ of error being to a *Federal Court*, and the case, as in the case at bar, being taken from the *Circuit Court* of the United States to the Supreme Court, *this* case being taken to the Circuit Court of Appeals, "other principles obtain," as said by Justice PECKHAM in the *Wilkes case*.

What are these "other principles?" Those, we submit, laid down by Justice GRAY in the *Laidley case* and in the *Folsom case*.

In the *Laidley case* there was a writ of error to the Supreme Court of the State of West Virginia, and the plaintiff in error insisted that the Supreme Court had jurisdiction to reverse the decision of that court. The Supreme Court, however, dismissed the writ of error; and Justice GRAY, in the opinion, on page 111, volume 159 U. S. R., says:

"The decisions cited by the plaintiff in error to support the jurisdiction of this court, in the case at bar, were either cases in which the writ of error was upon a judgment of a State court which gave effect to a *statute*, alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana vs. Pilsbury*, 105 U. S., 278; in *Chicago Ins. Co. vs. Needles*, 113 U. S., 574, and in *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 486; or else the writ of error was to a Circuit Court of the United States, bringing to this court the *whole case, including the question* how far the courts of the United States should follow the decisions of the highest court of the State, as in *Gelpcke vs. Dubuque*, 1 Wallace, 157, 205; *Olcott vs. Supervisors*, 16 Wall., 678, 690; *Douglass vs. Pike County*, 101 U. S., 677, 686; *Anderson vs. Santa Anna*, 116 U. S., 356, 361, and other cases cited in *Louisiana vs. Pilsbury*, 105 U. S., 278, 295."

The case at bar is an appeal to the *Circuit Court of Appeals* from a decree of a *Circuit Court* of the United

States, " *bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State.*"

Then we come to the question as to "how far the courts of the United States should follow the decisions of the highest court of the State."

The leading case upon this subject, and the one always relied on for a statement of the true rule, is *Burgess vs. Seligman*, 107 U. S. R., pages 20 and 33.

Justice GRAY in the *Folsom case* cites it, and quotes from it at length as the leading case, and lays down, himself, in that case, the rule as Justice BRADLEY defined it in the *Burgess* and *Seligman case*. Indeed, he bases his decision in the *Folsom case* upon this rule.

Speaking of this question Justice GRAY, on page 624, 159 U. S. R., says:

" The general principles which must govern the decision of this question have been often affirmed by this court, and were stated by Mr. Justice BRADLEY in delivering judgment, after great consideration, in the leading case of *Burgess vs. Seligman*, as follows:

"' The Federal Courts have an independant jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.' "

These are the words of Justice BRADLEY, in the case above cited.

With regard to the law of real estate, and the construction of State Constitutions and statutes, the Federal Courts will follow the constructions and decisions of the State Courts, except when contracts and transactions have been entered into, and rights have accrued thereon, *under a particular state of the decisions*, or

when there has been no decision of the State tribunals.

In this same case, on page 33, 107 U. S. Reports, Justice BRADLEY says: "We do not consider ourselves bound to follow the decision of the State Court in this case."

This was a case reviewed by the Supreme Court of the United States, upon a writ of error to a *Federal Circuit Court*, the latter having *refused to follow the decision of the State Court*, and the judgment of the Circuit Court was affirmed.

As the Circuit Court of Appeals, one year ago, in the *Stanly case*, seemed to take a different view of this rule from the one we cite from Justice BRADLEY, and as the petition for a rehearing in that case is now pending in that Court, and is to await the decision of this Court in the case at bar, we have argued this branch of the case more at length than we would otherwise have done.

We submit, further, that the rule to which there is *no exception*, and which has never been departed from, is defined as follows:

"The sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State or *decision* of its courts, altering the construction of the law" *(Ohio Life Insurance and Trust Company vs. Debolt*, 16 Howard, 432*)*.

In the last number of the U. S. Reports, Volume 174, page 499, *Wade vs. Travis County*, we find the rule laid down by Justice BROWN, in a case involving "the validity of certain bonds, issued

by the county of Travis," in the State of Texas. That Justice says, in the outset, that the case involves " the weight to be given to alleged conflicting decisions of the Supreme Court of Texas as to the validity of such bonds."

The case was begun in the Circuit Court of the United States, and the judgment of that court was affirmed by the Circuit Court of Appeals. Upon plaintiff's petition for *certiorari* the writ was allowed, and the Supreme Court reversed the decisions of these courts, which were against the validity of these bonds, as being issued in violation of the Constitution of Texas, and adjudged that they were valid and legal bonds. On page 508 the Justice says :

" In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look not only at their Constitutions and statutes, but at the decisions of their highest courts giving construction to them." *Post vs. Supervisors*, 105 U. S., 667, is one of the cases cited, in support of this rule, by the court.

" If there be any inconsistency in the opinions of these courts, the general rule is," adds the Justice, " that we follow the latest settled adjudications in preference to the earlier ones."

After laying down the general rule, as above, Justice BROWN says :

" An exception has been admitted to this rule, where, upon the faith of State decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid upon the principle that the holders, upon purchasing such bonds, and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise, would enable the State to set a trap for its creditors, by inducing them to subscribe to bonds, and

then withdrawing their own security *(Gelpcke vs. Dubuque*, 1 Wall., 175*)*." Other cases are cited for this exception, including *Burgess vs. Seligman*, 107 U. S., 20.

See further cases in this Court referred to in this Brief, infra, p. 59, under the subhead " Relevant and Controlling decisions in the United States Supreme Court in favor of Complainants' Contentions."

It is to be specially observed here that Justice BROWN cites, in support of the rule stated, the well-known case of *Gelpcke vs. Dubuque*, 1 Wall. That the Court may apply the foregoing to the facts in the case at bar, it is necessary to know when the decisions named in the first question or proposition were rendered; and when the bonds in question were issued, and when purchased by the complainants.

The cases are as follows :

Commissioners of Wilkes County vs. Clarence Call et al., 123 N. C. R., 308, decided November, 1898.

Bank vs. Commissioners, 119 N. C. R., 214, decided October, 1896.

Commissioners vs. Snuggs, 121 N. C. R., 394; decided November, 1897.

Rodman vs. Washington, 122 N. C. R., 39; decided, May, 1898.

Commissioners vs. Payne, 123, N. C. R., 432; decided, December, 1898.

The bonds in question were issued in October, 1889, and were purchased immediately after and during the same month by complainants in open market in the City of New York, for value, in good faith, they being unaware of any alleged defect of authority or other

irregularity in their issue and sale and having no suspicion of any such defect or irregularity.

Upon these bonds, as alleged in complainants' bill, the interest was paid semi-annually for eight years by the corporate authorities of Wilkes County. These bonds of Wilkes County are negotiable paper, and were issued not only at a time when no adverse decision of the State Courts had been made, but (as shown, *infra*) at a time when under decisions of the State Supreme Court as they then stood, and under the general principles of jurisprudence the said bonds were clearly valid.

We therefore maintain that the Circuit Court of the United States *was not bound*, in passing upon this case, by the decisions above set out, considered in connection with prior decisions and the articles and sections of the Constitution named in the first question or proposition certified by the Circuit Court of Appeals for instructions.

The Second and Third Questions Certified.

We come now to the second question or proposition certified (Record, p. 43):

"Whether, if the bonds and coupons in question were issued, put in circulation and came to the hands of complainants appellees in due course of trade for valuable consideration and without notice, and if there were at that time no decision of the Supreme Court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds."

The third question or proposition, it seems to us, is

so related to the second and dependent upon it that we will discuss both under the second head of this argument. It is as follows (Record, p. 43):

"Whether there was any decision adverse to the validity of these bonds or identical bonds, or any construction of the Constitution or law of North Carolina which affected the question of their validity when they came in due course of trade, and for valuable consideration, and without notice other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State of their invalidity."

Responsive to these questions, we hope to show these bonds in question are valid and legal bonds and that the ordinance and statutes authorizing their issue and sale, were enacted in accordance with the Constitution, *as interpreted and construed* by the highest Court of the State for many years before and even after their issue.

Doctrine of the Federal Courts as to State Court Decisions.

Here, again, we advert to the rule in *Burgess vs. Seligman*:

On page 625, Vol. 159, U. S. R., Justice BRADLEY lays down the rule as follows:

"Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the State, and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes.

"But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence."

What this Court says in *Township of Pine Grove vs. Talcott*, 19 Wall., 666, 667, is especially in point in the present case, and, therefore, we quote:

"The question before us [the validity of certain railroad aid bonds] belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. [This is emphatically true in respect of the Wilkes County bonds.] * * * The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery *(Butz vs. Muscatine*, 8 Wall., 579*)*."

In *Gelpcke vs. Dubuque* 1 Wall., 175, this Court says (p. 296):

"The same principle applies where there is a change of *judicial decision as to the constitutional power of the Legislature to enact the law.* [This is especially applicable here as the State Supreme Court in the *Forsyth County cases* of *Hill* and *Belo* decided in 1870 and 1877 had affirmed the validity of the laws authorizing the issue of the Wilkes County bonds.] To this rule thus enlarged we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. Bonds and coupons like these, by universal commercial usage and consent, have all the qualities of commercial paper. * * * We are not unmindful of the importance of uniformity

in the decisions of this court, and those of the highest local courts, giving constructions to the laws and Constitutions of their States. It is the settled rule of this court in such cases to follow the decisions of the State Courts. But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases."

Settled course of decision in North Carolina at the date of the issue of the bonds in suit, 1889, in favor of their validity.

In the next place, we are to inquire as to whether there was "*a settled course of decision*" in North Carolina upon the question presented by the record in this suit. If there was one at the time of the issue of the bonds and purchase of the same by complainants, this court will follow it.

In *Louisville, &c., Ry. Co. vs. Louisville Trust Company*, 174 U. S. R., on pages 573 and 574, Justice GRAY says :

"In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated as an axiomatic principle in the law of corporations this proposition : 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them' (10 Wall., 644, 645). The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* (1856), 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand* as well decided

upon its facts. *Knox County vs. Aspinwall*, 21 Howard, 539, 545 ; *Moran vs. Miami County*, 2 Black, 722, 724 ; *Gelpcke vs. Dubuque*, 1 Wall., 175, 203 ; *St. Joseph vs. Rogers*, 16 Wall., 644, 666 ; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited."

The cases cited by Justice GRAY in the above paragraph are decided upon *municipal bonds*, and show that the principle he states applies to contracts with municipal, as well as to other corporations ; and the late Justice MILLER, in his dissenting opinion, in the case of *Humboldt Township vs. Long*, 92 U. S. R., pages 650 and 651, says the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case, on which the rule and principles are based, is itself based upon *The Royal British Bank vs. Turquand.*

We state the above principle at this point in the argument to give emphasis to the rule that this court will so construe the Constitution of North Carolina, and the statutes authorizing the issue of the bonds, as to uphold the validity of the same, purchased in good faith, as they were, *if it can do so*, " *under any circumstances.*"

If this court can find there existed in North Carolina, at the time of the issue and sale of the bonds a course of decision of the highest court, upholding their validity, it will adopt that course of decision, and follow the same.

In the *Folsom case*, Justice GRAY, attaches importance to the inquiry, as to whether there is " a settled course of decision " in the State, upon the question stated (Vol. 159, U. S., page 627). The Court *will look* for a settled course of decision sustaining these bonds, in the interest of the innocent holder of the bonds,

who has purchased the same in good faith and for value.

Now, what constitutes a settled course of decision is a *question of law*, and to be decided by the court. If the court find decisions in the State which *appear* to have assumed the validity of such bonds as these, which decisions were rendered before their issue and sale, as alleged in the bill; and if the court find in the State decisions which *appear* to hold that the statutes authorizing the issue of these bonds were enacted in accordance with the Constitution; and if the court find that these bonds, and like bonds of other counties, were regarded and treated as valid securities by the *corporate authorities* of the county and by the *public*, by the *legal profession* and by the *legislative, executive* and *judicial departments* of the State; and if the court find that the complainants purchased the bonds, as alleged in the bill, relying upon their being legal and valid obligations of the county of Wilkes, then, as a matter of law, the court will hold there *was* a settled course of decision in the State, and that course of decision should be followed in passing upon the validity of the bonds.

Whether there was such a settled course of decision in the State before the issue and sale of the bonds; whether there were decisions of the highest court of the State, before the issue of the bonds and before the sale of the same, which *appear* to have assumed the validity of such bonds as these, and whether the decisions before and at the time of the issue and sale of the bonds *appear* to sustain and uphold the statutes authorizing the issue as having been legally enacted and according to the Constitution, and whether, acting upon these decisions, the corporate authorities of the

county regarded them as valid bonds, and whether they were so regarded by the executive, legislative and judicial departments of the State, and whether they were so regarded by the public and by the legal profession, are *questions of fact* to be determined upon evidence.

These are the rules by which the validity of the bonds sued on are to be determined.

Justice GRAY, in the *Folsom case*, on pages 626, 159 U. S. R., defines them to be as here stated. He does it in almost the exact words we have used.

The matters of fact must be determined in the first instance and *by evidence*. The decisions relied on by the County of Wilkes, all cited in the brief of the solicitor for the complainants—*Union Bank of Richmond vs. Commissioners of Town of Oxford*, 119 N. C., 214, S. E., 966; *Board of Commissioners of Stanly County et al. vs. Snuggs, County Treasurer*, 121 N. C., 394, 28 S. E., 539; *City of Charlotte vs. Shepard*, 120 N. C., 411; 27 S. E., 109; *Rodman vs. Town of Washington*, 122 N. C., 39; 30 S. E., 118; *Board of Commissioners of Wilkes County vs. Call et al.*, 123 N. C., 308—*are not even competent evidence* upon these matters of fact, because, as Chief Justice TANEY says:

"The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then *expounded by all the departments of its government* and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent acts of the legislature of the State or decision of its courts altering the construction of the law" *(Ohio Life Insurance and Trust Company vs. Debolt*, 16 Howard, 432*)*.

And because, as Chief Justice WAITE says:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its

operation on contracts and existing contract rights that would be given to a legislative enactment—that is to say, make it *prospective*, but not *retroactive*. After a statute has been settled by judicial construction the *construction* becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment" *(Douglass vs. Pike County*, 101 U. S., 687*)*.

The Court will see that the decisions named in the first question or proposition, certified by the Circuit Court of Appeals, were rendered years *after* the issue and sale of the bonds and purchase of the same by complainants.

What we propose to show as evidence of the fact that there was a settled course of decision in this State before and at the time of the issue and sale of the bonds, are decisions of the highest court of the State, from the adoption of the Constitution in 1868 to the year 1896, when the case of the Union Bank of Richmond vs. Commissioners of Oxford was decided (119 N. C. R., 214).

These decisions are evidence and show *what appeared* to be the law of the State before and at the time of the issue and sale of the bonds in 1889, seven (7) years *before the first decision*, relied on by appellants, was rendered in 1896.

On pages 24, 25, 26 and 27 of the certified record is printed the Charter of The North Western North Carolina Railroad Company, passed and granted by the Convention of 1868, being Chapter 17 of the Ordinances of that Convention, and *before the ratification of the* Constitution of 1868.

The sections of the Code of North Carolina, sections 1996 and 1997, authorizing the issue of the bonds and referred to in the bill, paragraph 21, page 5 of the record, are printed on page 28 of the same.

The statutes passed by the Legislature of North Carolina and referred to in the bill, paragraph 21, pages 5 and 6 of the record, are printed on pages 27, 28, 29, 30, 31 and 32 of the certified record.

The County of Wilkes contends that these statutes, not including, however, the ordinance charter, nor the sections of the Code referred to, are null and void, being unconstitutional, because enacted in violation of Article 2, section 14 of the Constitution.

It is admitted that the original charter—the ordinance—is valid, and that the sections of the Code, 1996 and 1997, were enacted in accordance with the requirements of Article 2, Section 14 of the Constitution, which is as follows:

"No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

The County insists that these *statutes* were enacted without the entries upon the journals of the yeas and nays, on the second and third readings, or one of such readings, of the bills.

The contention of the complainants is, that the bonds issued, under these statutes, are valid by the

laws of the State, and under the Constitution,, " *as expounded by all the departments of the government,*" and administered by the courts of justice, the same being in the hands of innocent purchasers for value, and issued and sold in good faith, and purchased by complainants, also, in like good faith.

Now, we come to the evidence of the facts, which constitute that settled course of decision in North Carolina, upon the question of the constitutional enactment of the statutes, relied on by complainants as authority and power, for the issue of these bonds.

Under the North Carolina decisions as they stood in 1889, when the bonds in suit were issued, an enrolled, duly signed and published act could not be impeached by legislative Journals.

In *Brodnax vs. Groom*, 64 N. C., 244, decided in 1870, the constitutionality of an act of the Legislature was attacked because section 12, Art. 2 of the Constitution was not complied with. This section is as follows:

" The General Assembly *shall not pass any private law, unless it shall be made to appear that thirty days notice* of application to pass such a law shall have been given, under such direction, and in such manner as shall be provided by law."

Upon this point the Court, speaking through Chief Justice PEARSON, says:

" We do not think it necessary to enter into the question whether this is a public local act, or a mere private act, in regard to which thirty days' notice of application must be given; for taking it to be a mere private act, we are of opinion that the ratification certified by the Lieutenant Governor and the Speaker

of the House of Representatives make it a matter of record, which cannot be impeached before the courts in a collateral way. Lord COKE says: 'A record, until reversed, importeth verity.' There can be no doubt that the acts of the Legislature, like judgments of courts, are matters of record, and the idea that the verity of the record can be averred against, in a collateral proceeding, is opposed to all the authorities. The courts must act on the maxim, '*Omnia praesumuntur, etc.*' Suppose an act of Congress is returned by the President, with his objections, and the Vice-President and the Speaker of the House certify that it passed afterwards by the constitutional majority; is it open for the courts to go behind the record, and hear proof to the contrary?"

PEARSON, Chief Justice, in this extract from his opinion, says it makes no difference whether the act be *private* or *public;* it is the same. The statutes in question are either *public* or *private*, and are *both* included by the Chief Justice in his statement of the principle.

In *Gatlin vs. Town of Tarboro*, 78 N. C., 119, decided in 1878, the court said, in reference to the same section and article of the Constitution:

"If it appeared from the act itself, or affirmatively appeared by the Journals of the Legislature, which would have been competent evidence, that the notice of the intended application for the intended act, which the Constitution requires, had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the courts below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the Legislature had obeyed the Constitution, and that it appeared to it that the notice was given. '*Omnia praesumuntur rite esse acta.*' We cannot accept the agreement of the parties that no notice was in fact given, as proof that it did not appear to the Legislature that the required notice had been given. In such case the best and only proof is by the record. Our opinion on this point is supported by a

recent decision in Illinois (*Happel vs. Brethraner*, 70 Ill., 166)."

The case *Brodnax vs. Groom, supra*, is not cited.

The next case in which the effect of a legislative act as a record importing verity was discussed was in *Scarborough vs. Robinson*, 81 N. C., 409, decided in 1879. In this case the quotation above made from *Gatlin vs. Tarboro* (declared to be a dictum), *was overruled as being repugnant to the doctrine*, enunciated in *Brodnax vs. Groom, supra*, and the doctrine of the earlier cases approved. In this case the court, speaking through Chief Justice SMITH, cited with approval; *Pacific R. R. Co. vs. Governor*, 23 Mo.; 353 *Pangborn vs. Young*, 23 N. J. Law Rep., 29; *Nevada vs. Swift*, 10 Nev., 176, committing the court to the views expressed by the Chief Justice, in *Nevada vs. Swift*, 10 Nev., 176, as follows:

"My general conclusion then is, that both upon the grounds of public policy, and upon the ancient and well-settled rules of law, the copy of the bill attested in the manner above mentioned and filed in the office of the Secretary of State is the conclusive proof of the enactment and contents of a statute of this State, and that such attested copy can not be contradicted by the Legislative Journals, or *in any other manner*."

In this case, Chief Justice SMITH quotes with approval the above quoted words of PEARSON, Chief Justice, in the case of *Brodnax vs. Groom*.

The next case in the state Court, in which the dignity and requisites of a valid legislative act were considered, was *State vs. Patterson*, 98, N. C., 660, decided in 1887. In this case, was directly considered a statute, which had no enacting clause as required by Section 21, Article 2 of the State Constitution, and the State Court held the statute void for this defect, being a *defect ap-*

parent on the face of the act. The court further says, as perhaps pertinent to the matter now under consideration:

"The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the Constitution makes it so. If the Legislature should pass merely verbal expression of its will, not in writing, in respect to a particular matter three times, such act would not be a statute or have effect. It must be expressed in writing, or printed, so that it can be seen, read and preserved. A bill perfected and passed is not a statute—it cannot become so until it is authenticated."

The defect in the statute above was apparent upon its face; the defect was the *first thing to be seen* upon an inspection of the act itself. The bill was not perfect within itself. If the bill had passed in its perfect form, it would not have been a statute until something else was done. It must be authenticated. An imperfection in the *form of a statute* can only appear by an examination of the *act* itself.

A bill perfect in form is passed when authenticated. The bills to be entitled acts, when passed in the case at bar, were all in proper and perfect form, and were passed when authenticated.

This case is in no way contradictory of what is said by PEARSON, Chief Justice, and SMITH, Chief Justice, in the cases above cited.

The Supreme Court held in *Scarborough vs. Robinson, supra*, that the signatures of the presiding officers, affixed to the bill, passed while the Legislature was in session, was essential to make it a statute, and for the like and other reasons the enacting clause is likewise essential. *The defect in both cases appeared on the face of the act;* the difference between the two cases consists only in

the fact that in the former, *Scarborough vs. Robinson*, the want of authentication was in the failure of the presiding officer to sign the bill, and in the latter the absence of the enacting clause.

In *Bank vs. Commissioners*, 119 N. C., 214, the act is declared valid as a railroad charter, because passed in regular and perfect form. The court says the certification cannot be impeached by the journals.

In the next place, we call the attention of the court to decisions of the Supreme Court of North Carolina, all before the issue and sale of these bonds, which uphold the validity of municipal bonds, issued in aid of the building of railroads and for other purposes.

In the the case of *Belo vs. Commissioners*, 76 N. C., BYNUM, Justice, says on page 489:

"As soon as the sting of taxation is felt, the self-burdened people cast about for relief, and after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith with its dismal train of evils." The learned justice adds: "No refuge for repudiation can be found in the legal tribunals of this country. They have sternly resisted every subterfuge to escape the just obligation of these contracts."

In *Street vs. Commissioners*, 70 N. C., 644, Justice READE has declared the courts would not allow technical advantages which involve a breach of faith in the obligation of municipal bonds.

In this case, decided in 1874, the same Justice says:

"Twenty years ago the people voted to subscribe the stock and to borrow money on it—they got the money and built the road, and have had the benefit of it, and now have it. They have recognized the bonds and paid the interest and a part of the principal up to the war. * * * In the impoverished condition of the people it may be hard to pay now, but what can the courts do? They cannot relieve from contracts, nor postpone their fulfillment."

In *Hill vs. Commissioners of Forsyth Co.*, 67 N. C., page 369, the same justice uses language similar to the above.

Also, in *Johnston vs. The Board of Commssioners*, 67 N. C., 101.

All the cases in the Supreme Court Reports of the State prior to 1898—and there are many—some of which will be commented on in another part of this argument, *appear to have assumed* the validity of such bonds as these. The cases, already mentioned, and those to be mentioned, are cited here as *evidence of how such bonds were regarded* during that period.

As further evidence of the existence of a settled course of decision upon this question we will inquire how the decisions during this period impressed the *public*, the *legal profession*, the *corporate authorities*, and the *legislative department of the State*. The public, relying upon the decisions, have invested in these bonds and similar bonds to the extent of at least one-half million of dollars. The records of the Circuit Courts of the United States in North Carolina show over three hundred thousand invested in these bonds, all only recently contested upon the same grounds that are. It is not pretended by any one that any of the these bonds were not issued in good faith. *In every instance* the counties got in return for the bonds the railroads and the improvements for which they were issued.

The legal profession was impressed with the decisions of the court upon this question, because the point was never raised in North Carolina until the decision of the case of *Bank vs. Commissioners of Oxford*, 119 N. C. R., 214, in 1896. There was a period of nearly

thirty years between the decisions in *Brodnax vs. Groom* and *Bank vs. Commissioners of Oxford.*

The records and journals of the Legislative department of the State show how this course of decision had impressed itself upon the law-making power of the State. It is not to be presumed that the Legislature would enact statutes similar to these unless it had been impressed with the decisions of the courts upon the constitutional question involved. The Legislature is not amenable to the suggestion that it would "set a trap for the creditors of the State," as was said by Justice BROWN in the case already cited in this brief.

Nor can it be presumed that the corporate authorities of the counties would have issued the bonds under these statutes if they had not been impressed with the decisions set out in this argument.

We will now show how the Judicial Department was impressed with these decisions. In the case of *Carr vs. Coke,* 116 N. C. Rep., 223, 1895, Justice MONTGOMERY says:

"That instrument [the Constitution] certainly does require that 'all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses,' and it is equally certain, under the decisions of this court, that the certificate of ratification, attested by the signatures of the presiding officers, carries with it the presumption, conclusive, that all such bills and resolutions have been duly passed by the bodies, and cannot be questioned by the court. Suppose, as individuals, we admit—which the answer does not--that this bill did not pass its several readings, can that fact be shown in a court of law in the face of ratification and the genuine signatures of the presiding officers certifying to the contrary? This is the naked question. Ratification gives authority to the act. The presiding officers who, upon ratification, attach their signatures to the bill, do it in open session, calling attention of the members to the fact that the

same is about to be signed, and reading the title to the bill. When it is signed, ratification is thereupon made of it by the body through their agents, the presiding officers. It is their act and deed, and nothing, not even the Journal itself, can contradict it or be used as evidence against it. *Ratification* is of higher dignity and of more authority than the *journals* kept by the clerks. Ratification and the signatures of the proper officers presume a passage of the bill by the Legislature *according to the requirements of the Constitution and the courts of law—the judicial department, a co-equal department—are not allowed to go behind or question them.* **We have clear authority for this in our reports."**

On page 235 of volume 116, N. Car. Reports, in this case of *Carr vs. Coke, decided in 1895*, Chief Justice FAIRCLOTH, in the leading opinion of the court, says :

" At common law, the ratification and approval of an act of Parliament, thus made, is the highest exercise of the highest authority that this kingdom acknowledges upon earth.

" The journal is of good use for the intercourse between the two houses, and the like, but when the act is passed the *journal* is expired."

The Chief Justice then cites *Brodnax vs. Groom*, and quotes the language of PEARSON, Chief Justice, already copied in this brief. He also cites *Scarbrough vs. Robinson*, 81 N. Car., and quotes from the opinion of Chief Justice SMITH in that case, " to show," as he says, " the trend of the judicial mind of the court as then constituted."

In the case of *Commissioners vs. Snuggs*, as already referred to in this brief, FAIRCLOTH, Chief Justice, in his dissenting opinion, on page 407, of volume 121, says :

" My reasoning is stated in *Carr vs. Coke*, 116 N. Car., 223. In that case it was held that, when a bill had been signed by the presiding officers of the As-

sembly, the court cannot go behind such ratification to inquire how the bill was passed. The ratification is a record, and concludes the matter."

Again he cites *Brodnax vs. Groom* as decisive of the question presented. This was in 1897, *the first time the doctrine in Brodnax vs. Groom was ever departed from, or even questioned*, except, in 1896, in the case of *Bank vs. Commissioners*, 119 N. C., 214, six years after the issue of the bonds by Wilkes County, and after the interest had been collected, five years in succession, and paid to complainants and the other bondholders by these same corporate authorities, every year, when due, for four years. In the closing paragraph of his opinion, on page 410, Vol. 121 N. C. R., the Chief Justice says :

" They have recognized and paid the annual interest on these bonds for several years without objection, and it is *possible* that they never discovered the absence of the words ' yea ' and ' nay ' on the journals until since the decision of this court in *Bank vs. Commissioners*, 119 N. C., 214, decided in 1896."

Here, in this case, *Commissioners vs. Snuggs*, the *Stanly case*, the Chief Justice, in his dissenting opinion, says the reason for his dissent is stated by him in the case of *Carr vs. Coke*, in the leading and ruling opinion of the Court, Justice MONTGOMERY filing a concurring opinion, from which the above extract is taken.

At that time, 1895, six years after these bonds were issued, and had come into the hands of complainants, we see the Supreme Court of the State was impressed with the fact that there was a settled course of decision, such as we contend for upon this question in this State.

The settled rule was, *so far as this State was concerned*, to which there was no exception, that, when any "act is passed, the *journal* is expired."

If, then, upon the passage of an act, the journal is expired, how can that journal be used as evidence in this case?

In the case of *Bank vs. Commissioners of Oxford*, 116 North Carolina Rep., on page 368, the first time it was before the Court, February Term, 1895, the Court say, *there being no dissent:*

"The purchaser of such coupons as those sued upon must so far act upon the notice contained in the recitals, as a general rule, as to examine *the statutes referred to*, and ascertain, at his peril, whether the essential prerequisites to the validity of the bonds have been met, both by Legislative and popular action. *We hold that, upon a fair construction of the organic law, and pertinent statutes, and their application to the facts of this case*, there *has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the Court erred in holding that the plaintiff* was not entitled to recover, and the judgment of non-suit must be set aside and a new trial granted."

This was the expression, upon the question presented here, of the mind of the Supreme Court early in 1895, and was in accordance with what had been understood by everybody to be the settled course of decision in North Carolina for nearly thirty years, ever since the decision of *Brodnax vs. Groom*, 64 N. C. R., 244. It shows how the Court was impressed in 1895.

At the September Term of the Court for the year 1896, more than a year after the decision in this same case, from which the above extract is taken, *Bank vs. Commissioners of Oxford, again came before the Court*, by appeal on part of defendant, the Board of Com-

missioners of Oxford; and the Court, *for the first time within its history*, held it to be incumbent upon a bondholder, purchasing for value in good faith, to look to the journals of the houses of the Legislature to see if the yeas and nays had been entered thereon in accordance with the requirements of the Constitution.

119 N. C. R., 214.

The Chief Justice, dissented from the judgment of the Court, showing it to be contrary to, and in violation of, a settled course of decision, which had obtained in the State since 1868, the date of the adoption of the Constitution, which settled course of decision had impressed itself upon the public, upon the legal profession, upon the Legislative Department, the Judicial Department, the corporate authorities of the Counties of the State, and upon the purchasers of and investors in corporate and municipal bonds, both in this State and other States.

Here, indeed, was a new point taken, a new point presented, for the first time in this State, upon which repudiation of honest debts was to be justified; upon which bonds bought, in due course of trade, for value, at the highest market price, issued in good faith with no suggestion that the Counties did not get full return for them, are to be repudiated.

The case of *Douglass vs. County of Pike*, 101 U. S., is strikingly in point. It was a bond case and the bonds were sustained as against a decision of the Supreme Court of the State made after the bonds were put out that the enabling Towship Aid Act was *unconstitutional.*

At page 679 Chief Justice WAITE says:

"We are asked to reconsider our decision in *County of Cass vs. Johnston* (95 U. S., 360) because since that case

the Supreme Court of Missouri, in *State ex rel. Woodson vs. Brassfield* (67 Mo., 331), and *Webb vs. Lafayette Co (id., 353)*, has held the township aid act, which we sustained, to be unconstitutional. The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced. In the *Cass County case* we said that the Supreme Court of the State had often been called on to construe and give effect to the act, and had never before that time, in a single instance, expressed even a doubt as to its validity. We have again examined all the cases and find that what we then said was true. Judge DILLON, who filled the office of Circuit Judge in the Eighth Circuit with such distinguished ability during nearly all the time the act was in operation, from its original passage until after the recent decisions, remarked in *Westerman vs. Cape Girardeau County*, 7 Central Law Journal, 354: 'A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the Federal Courts of this State, and prior to the decision in *Harshman vs. Bates Co.* (92 U. S., 569) none of the able lawyers defending these cases even made a point that the Act of March 23, 1868, was unconstitutional.' The reason is obvious."

In the same case, on page 687, the Chief Justice further says:

"We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

On page 258, Vol. 116 N. Car. R., one of the two Justices who delivered dissenting opinions in the *Oxford Township case* in the year 1895, five years after these Wilkes County bonds had come into the hands of the complainants and after the county had *many* times paid the interest on the same, says:

"Looking at the case from the standpoint of my brethren, it appears from a brief of cases involving the

question whether the ratification can be contradicted by the journals, which will be found in the notes on pages 661-667 of Volume 143 of the United States Reports, that in twenty-eight of the States the courts have held that it is competent to impeach the ratification by the journals, directly; while it is held to the contrary in but nine States."

We turn to the volume mentioned by the Justice and find, on page 665, included in that brief, the following: "North Carolina—In North Carolina it is held that the enrolled act is conclusive (*Brodnax vs. Groom*, 64 N. C., 244; *State ex rel. Scarborough vs. Robinson*, 81 N. C., 409)."

That brief was prepared by the Attorney-General, Mr. Miller, and the Solicitor-General, Mr. Taft, afterwards Circuit Judge of the United States.

In the dissenting opinion of the other Justice in *Carr vs. Coke*, above cited, we find, on page 266, the following:

"In other States questions have come up as to the power to go behind the certificate of ratification, signed by the speakers in cases of minor irregularities, and it has been held in twenty-eight States that this can be done." "In nine States only it has been held that the certificate of ratification is conclusive against irregularities. These cases need not be here cited and reviewed. They are easily accessible in the 23 Am. and Eng. Enc., 196, *et seq.*"

We turn to the volume cited by the learned Justice and find, on page 196, *et. seq.*, the following—First, on page 202:

"(1) First view—Conclusiveness of Bill. The first view is that the enrolled act, signed by the presiding officers of both houses and by the executive, is the sole expositor of its own contents, and the conclusive evidence of its existence and valid enactment, and that it is not allowable to look into the journals of the houses, or to other extrinsic sources for the history of the act

or its provisions or to attack the manner of its enactment." On same page, in a note, we find the following: "2. The following authorities tend to support this view." Page 206: "North Carolina. *Brodnax vs. Groom*, 64 N. Car., 344; *State vs. Robinson*, 81 N. Car., disproving *dictum* in *Gatlin vs. Tarboro*, 78 N. Car., 119."

The facts giving rise to this decision were that a duly authenicated act was sought to be impeached by the Journals, showing that in the House the bill was tabled on the second reading, and that in the Senate no such bill was introduced. As to what this case decided and the far-reaching importance of the doctrine enunciated in the opinion, we will give the views stated by the Supreme Court of Kentucky in the case of *Lafferty vs. Huffman*, 32 L. R. A., 203, speaking through Justice HAZELRIGG. The learned Justice says:

"In the recent case of *Carr vs. Coke* (1895), 116 N. C., 223, the case was considered as one of new impression in that State, and, after what seems to us a very satisfactory course of reasoning and a review of the principal authorities, the conclusion was reached that 'when the Legislature had solemnly certified to a fact—that is, to the passage and ratification of an act which is within its own sphere'—the judiciary will not be permitted to inquire into or dispute that certification."

Thus, this was the North Carolina doctrine down to 1895. But in 1896 the court held otherwise for the first time, in the case of Bank vs. Commissioners of Oxford, 119 N. C. R., 214, 1896, saying:

"This case has no analogy to *Carr vs. Coke*, 116 N. C., 223. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. And so it is here, the certificate of speaker is conclusive that this act passed three several readings in each

house and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house and that the yeas and nays were entered on the journals."

It may be repeated that no such facts are required by any provision of the Constitution, nor of any statute nor by any parliamentary usage, to be certified. We respectfully submit that the scope of the decision of *Carr vs. Coke* is not *fully stated* by the learned Justice, as the quotation from it or the readings of the opinions show. If *Carr vs. Coke* had no analogy to the case of *Bank vs. Commissioners*, why, may we ask, did the learned Justice, speaking for the majority of the court, in *Bank vs. Commissioners*, in his *dissenting opinion*, in *Carr vs. Coke*, refer to the many cases relied upon in *Bank vs. Commissioners ?*

Here we see the learned Justice, in his opinion, speaking for the majority of the court in *Bank vs. Commissioners*, using and relying on the authorities and precedents in *support* of the same that he used and relied on in his *dissenting* opinion in *Carr vs. Coke.* Then, how can that Justice say the two cases have no analogy to one another ? According to his *arguments* and *authorities* and *contentions*, as they appear in the opinion in the Bank case, and in his dissenting opinion in the *Carr vs. Coke* case, *both* cases involved the *same principle.*

The Chief Justice, who delivered the opinion in the case of *Carr vs. Coke*, in his dissenting opinion in *Commissioners of Stanly Co. vs. Snuggs*, 121 N. C. R., on page 407, says :

" My reasoning is stated in *Carr vs. Coke*, 116 N. Car., 223. In that case it was held that, when a bill had been signed by the presiding officers of the Assembly, the court cannot go behind such ratification to

inquire how the bill was passed. The ratification is a record, and concludes the matter."

Again he cites *Brodnax vs. Groom* in support of his opinion. He also had dissented in *Bank vs. Commissioners*, 119 N. C.

This shows the *Chief Justice* was impressed with the idea that the *principles* in *Carr vs. Coke* and *Bank vs. Commissioners* and *Brodnax vs. Groom* were analogous.

In the opinion of his Honor Judge GOFF, speaking for the court in *Board of Commissioners Stanly Co. vs W. N. Coler & Co.*, decided August 11, 1899 (96 Fed. R., 284), is the following:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina inconsistent with the decisions of that court in the cases of *Union Bank of Richmond vs. Commissioners of the Town of Oxford* and *Board of Commissioners of Stanly County et al. vs. Snuggs, supra*, which had become rules of property and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and, in our opinion, that court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned. **It is true that in some instances the language used by the court is misleading in its tendencies, and even susceptible of the said construction so placed upon it;** but a careful consideration of the cases and of the facts to which they relate forces the conclusion that the court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of Art. 2, section 14, of the Constitution of the State of North Carolina."

The decisions we have cited here *as evidence* of the settled course of decision which obtained in North Carolina at the time and before the issue and sale of the bonds in question, are treated by His Honor Judge GOFF as if we had cited them as *authorities.* With the highest possible respect for the Circuit Court of Appeals and for the writer of the opinion, it seems to us that there was a total misconception by the Court of our purpose in citing the cases suggested. As we have said, these cases were brought to the attention of the Court *as evidence of the settled course of decision* contended for.

They seem to have impressed the Circuit Court of Appeals as "being susceptible of the said construction so placed upon them," as appears in the extract above written from the opinion of Judge GOFF.

It was hardly to be supposed that a bondholder, before his purchase of a bond in due course of trade for value and in good faith put upon the market by the corporate authorities of the County issuing the same, would make "an analytical examination of the cases referred to" before purchasing the bond, and especially so, in view of the recitals in the bond and the well-understood rule, as laid down in *Bank vs. Commissioners*, in Vol. 116, N. C. R., page 368, already quoted in this argument.

If these cases referred to *were susceptible of the construction placed upon them*, as said by his Honor Judge GOFF, then in favor of the bondholders purchasing in good faith, it seems to us the duty of the Court was to give them that construction *(Louisville, &c., Ry. Co. vs. Louisville Trust Co.*, 174 U. S. R., 573 and 574*)*.

What was said by Justice GRAY in this Louisville

case, and also in *Merchants' Bank vs. State Bank*, 10 Wallace, 604, was the well-understood rule, and laid down to be such, in *Belo vs. Commissioners of Forsyth County* in 1877, the leading case upon municipal bonds in North Carolina—one which has been cited many times in our Courts, and always with approval (Vol. 76, N. C. R., 489).

We call to the attention of the Court the cases of *McDowell vs. Construction Co.*, 96 N. C. R., 514, and *Goforth vs. Construction Co.*, in same volume, 535, and to the cases cited therein, as evidence of how such bonds as these in question were regarded in North Carolina in 1877 when they were decided.

In *McDowell vs. Cons. Co.* and *Goforth vs. Cons. Co.*, above referred to, it was contended that the bonds issued by the Counties of Cleveland and Rutherford were void because of irregularity of the elections; and, although the requirement in Article 2, Section 14, of the Constitution, was not complied with, no point was made upon it. These cases were abandoned by the plaintiffs, and, upon failure to pay the interest upon the bonds, suits were brought in the Circuit Court of the United States, in 1888, upon the coupons, at Charlotte, North Carolina, to compel payment of the same. In these suits there was no suggestion of the point raised by respondents in the case at bar.

The bonds issued by the Counties above referred to were adjudicated valid and legal bonds by the Circuit Court of the United States, and in obedience to such adjudication the interest on the same has been paid regularly ever since.

In 1895, the case of *Carr vs. Coke*, before referred to, was decided by the Supreme Court of North

Carolina, to the effect that not even *for fraud* was it competent to go behind the ratification and enrollment of a bill to show it had not been *read three times*, as the Constitution requires. One of the requirements of Article 2, Section 14, of the Constitution, was that there should be three readings, and that the journal should show that fact. Such being the case, can it be assumed, or supposed, that the Court would hold it not competent to introduce the journals to show the *three readings;* and that it was competent to show, by the journals, the fact that the yeas and nays had not been entered thereon?

No bondholder, no corporate authority, no part of the legal profession, no department of the State government, no part of the public, would ever so conclude. It would appear to all, and would be so regarded by all, that the Court decided that case in the light of this settled course of decision as we insist it obtained in the State.

Now we have shown these decisions in our State for a period of twenty-five years.

We have shown an unbroken current of decisions for a longer period, upholding bonds similar to the bonds in question.

We have shown how these decisions have impressed the legislative department of the State, and how that department of the government continued, from time to time, to enact statutes of a like kind in the same manner.

We have shown how the corporate authorities of the counties regarded these statutes, and the bonds they issued under them, from time to time.

We have shown how these decisions impressed the public, and how the public invested money in the bonds

issued under the same, regarding them as valid bonds, and relying upon their validity in good faith.

We have shown how the legal profession in State and other courts outside of the State have been impressed by these decisions.

And we have shown how the judicial department of the State was impressed by these decisions, not only in the State, but beyond the limits of the State.

These are facts established, and we contend, as a matter of law, this court will hold they constitute a settled course of decision.

We insist further that this court will, in the light of these facts and the law, as laid down by Justices GRAY and BROWN, in the cases cited herein from the 174 U. S. R., follow this course of decision. If the "court *can do so, under any circumstances*," it will uphold these bonds.

The Convention Ordinance of March 9, 1868, and the Amendatory Acts and their judicial construction prior to the issue of the Wilkes County bonds, are full authority for the issue of these bonds.

In the next place, we come to the ordinance of 1868, incorporating the North Western North Carolina Railroad Company, and to the statutes and sections of the Code of North Carolina, all set out in full in the bill and printed record. The ordinance is the charter of the company, "and by section 12 of the charter," says BYNUM, Justice, in *Belo vs. Commissioners*, 76 N. C., page 490, "the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to *counties and towns* as was conferred by an act incorporating the Atlantic and

North Carolina Railroad Company passed by the Legislature of 1852."

"By section 34 of the latter act," says the Justice, "an election was held in the county of Forsythe and the subscription made and bonds issued and the same put upon the market and sold to the purchaser at his banking house in Salem, N. C., on *the 5th of March, 1869.* The bonds recited that they were authorized by an ordinance of 1868 by an order of the Court of Common Pleas and Quarter Sessions of Forsythe county, at June term, 1868, and re-enacted and ratified and confirmed by an act of the General Assembly, ratified the 11th of August, 1868."

The board of commissioners of Forsyth county in 1872 "refused to assess any further tax to pay interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the county was illegal and void."

The bonds were declared to be legal and valid by the Supreme Court in this case.

It is *under this same charter* that the North Western North Carolina Railroad Company *extended its road* as further authorized and provided for in an act to amend this charter as printed in the record, which amendment, as the act shows, "was read three times in the General Assembly and ratified the 20th day of February, A. D. 1879." (Record, p. 30.)

In the body of the bond are these words: "This bond is issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the North Western North Carolina Railroad for the construction of *a second division* from the towns of Winston and Salem, in Forsyth county, to the Yadkin Valley by Wilkesboro to Patterson's factory, Caldwell county," and authorized by a vote of a

majority of the qualified voters of Wilkes county." (Record, p. 24.)

In the printed record is "An act to authorize the North Western North Carolina Railroad Company to *extend its road and to build branches thereof.*" This act shows on its face that it was "read three times and ratified this 2d day of March, A. D. 1881." (Record, pp. 30, 31.)

Section 13 of the charter authorizes the company "to construct *branches* of said road, *one* of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia."

By Section 12 of the charter the powers and authority are conferred to subscribe and issue bonds, and under the same regulations and restrictions, as that given to *counties* and towns by an act incorporating the Atlantic and North Carolina Railroad Company, passed in 1852. *This is so held by the Supreme Court, on page 490, 76 N. C. in Belo vs. Commissioners, 1877.* It is not denied that Section 34 of the Act of 1852 gave to the counties and towns along the line of the Atlantic and North Carolina Railroad the power to issue bonds in payment of subscriptions to stock. This is so held in the same case (see p. 31 of record for Act of 1852).

Then we see that the "*charter*" (the ordinance of the convention) *in express terms* makes the charter of the Atlantic and North Carolina Railroad Company a part of the charter of the North Western North Carolina Railroad Company so far as it relates to the subscription of counties to the capital stock of the company. This being so, the charter of the Atlantic and North Carolina Railroad Company is to be read and considered as a part of the charter of the North Western

North Carolina Railroad Company *(Range Co. vs. Carver*, 118 N. C., 328; *Commissioners vs. Higginsbothern*, 17 Kansas, 62*)*. It is like an instrument referring to another instrument—*Flaum vs. Wallace*, 103 N. C., 296—or where the complaint in one action refers to the complaint in another action for *data—Alexander vs. Norwood*, 118 N. C., 381—" they are to be read and considered as one instrument."

We have shown that the subscription to this same company, made by Forsyth County, under the charter as originally passed, has been upheld by the Supreme Court *(Hill vs. Commissioners*, 67 N. C., 367, 1870; *Belo vs. Commissioners*, 76 N. C., 487, 1877*)*.

The Constitution of 1868, framed by the Convention that passed the ordinance of incorporation of this company, its charter, went into effect on the 22d or 24th of April, 1868.

" By this Constitution, and subsequent legislation, the County Court was abolished, and the county commissioners succeeded to their powers." This is held so in *Belo vs. Commissioners, supra.* In Wilkes County, into which this railroad runs for over 20 miles, the commissioners, who were the successors of the justices, made the subscription to issue the bonds in question, as they were clearly authorized to do.

It can nowhere be shown that the charter of this railroad company has been repealed, nor is it pretended that, unless it is repealed, these bonds are not issued in accordance with the Constitution. See the dissenting opinion of Justice FURCHES in the case of *Commissioners vs. Call*, 123 N. C., page 327. This opinion is concurred in by the Chief Justice, who says: " I concur in the dissenting opinion."

In this connection we call the attention of the court to what Justice GRAY says in *Folsom vs. Ninety-six*, on page 627, Vol. 159, U. S. R., in speaking of the ground on which the majority of the court in the case decided by the South Carolina Court based the decision, in which the Act of Assembly of that State was declared unconstitutional. In giving his reason for not following the decision of the State Court, the Justice says: "We are unable to concur in that view, and are much better satisfied with the reasoning of the dissenting opinion."

We think this court will, upon reading the opinion of Justice FURCHES, be "much better satisfied" with it than with the opinion of that Justice who wrote the opinion of the majority of the court. And when these two opinions shall have been read, and their reasoning considered, this court will follow the rule laid down by Justice GRAY, in *Louisville, &c., vs. Railway Company*, 174 U. S., pages 573 and 574.

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them" (10 Wall., 644, 645).

We have seen that this principle applies to municipal bonds in a former part of this brief.

On page 27 of the record, sections 12 and 13 of the charter give this corporation "power to construct branches of" the road, and conferred the authority and

power, given in Section 33 of the Act of 1852, as will be seen on page 31 of the record.

This is expressly held by the Court, in *Belo vs. Commissioners*, 76 N. C. R., on page 490, the leading case in North Carolina, on municipal bonds. In the light of this holding, how can it be said that there was no power conferred upon the County of Wilkes, to issue these bonds ?

This power conferred, was not only a power of the County, and counties, granted by the charter, *but was a privilege of the Company (County of Scotland vs. Thomas,* cited *infra).*

In further consideration of the ordinance of the Convention of 1868, the charter of this railroad company, we see that it gave the power to build branches of the road in *any* direction, and we see that the statutes, relied on by the complainants were amendments to the charter, and gave no *powers not already conferred by the charter itself upon the company and counties, towns and cities.*

We see, also, that the charter was granted in 1868, before the Constitution went into effect, and the statutes printed in the record, and amendatory of the same, passed after the Constitution was adopted.

Here we ask a consideration of the case of the *County of Scotland vs. Thomas*, 94 U. S. R., page 682.

On page 689 of the Volume, in that case, Justice BRADLEY says:

"The specific question in the present case, therefore, is, whether the authority given to counties and towns in 1857, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co., has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question, by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call*, before referred to.

We venture to call the attention of the Court specially to *Belo vs. Commissioners*, and to the case of *County of Scotland vs. Thomas*, 94 U. S. R., page 682.

It should not be forgotten that the bonds in suit were issued in good faith, by the corporate authorities of Wilkes county, and purchased in equally good faith, by the bondholders, complainants in this bill, and their issue authorized by a large majority of the qualified voters of the county.

It is true also, that the purchasers of these bonds for value "*were unaware of any defect of authority, or other irregularity*, on the part of those acting for the

county," and there was nothing to excite suspicion of such defect or irregularity, if any did exist.

It is equally true that the county has for years enjoyed the benefit of the railroad built, and operated within its limits, for over twenty miles. It is not suggested even, that the building of this road was not, in all respects, satisfactory to the people of the county. Good faith on every hand prevailed, and was practiced.

As we say, all these facts are admitted, substantially as herein set out.

Then, it cannot be denied that, to uphold the bonds, will work no wrong, do no injustice, to any one. The county of Wilkes got what it wanted, and is not dissatisfied with it.

How is it on the other hand? To invalidate the bonds will be to do an injustice; to take from an innocent purchaser in good faith a commercial value, for which he paid his money.

Then we submit this is not the court in which to come and ask in vain that these securities be upheld.

When we read the case of the *Louisville Railway Co. vs. The Louisville Trust Co.*, in Vol. 174 U. S. R., 573 and 574, we find that Justice GRAY, in writing the opinion, had in his mind a case of this kind.

If it be contended that the late decision of the case of *Commissioners vs. Call*, 123 N. C. R., 308, 1898, in the State Court is a bar, a *res adjudicata* here, as was done in the *Stanly case*, we submit it is not.

In the case of *Carroll County vs. Smith*, a judgment had been given in favor of the county in a State Court, between it and certain of its bondholders, and it was *held to be no estoppel on holders of bonds who were not before the court. It has also been held that they cannot be made*

parties, and bound by publication made for them as unknown defendants.

Carroll Co. vs. Smith, 111 U. S., 563.
Pana vs. Bowler, 107 U. S., 544–45.
Brooklyn vs. Ins. Co. 99 U. S., p. 370.
Empire vs. Darlington, 101 U. S., p. 92.

Commissioners of Wilkes Co. vs. Call, 123 N. C. R., 308, 1898, was ex parte, if not collusive.

This is the law, even assuming that the case of *Commissioners vs. Call* was not a collusive one. It seems to us, however, that it is collusive, and it is hard for any one to read this record without so concluding. We refer to this to show there was no sentiment in the county in favor of the repudiation of this debt. Read the answer of Call, in this suit, on page 20 of the record; read what Justice FURCHES says in his dissenting opinion, already referred to; read the agreement of counsel for the defendants in the State Court, on page 48 of the record in case of *Turner vs. Commissioners of Wilkes County*, heretofore filed in this Court, and the remarks of Justice FURCHES concerning that agreement; and read, on page 33 of the record, what appeared in the opinion of the court, as certified to the Supreme Court of the United States, and read the brief of the counsel for the plaintiff in error in said *Turner case*, and note a failure therein to call the attention of the Supreme Court of the United States to the mistake of the court, in that opinion, concerning the most important matter in the record.

There were no adverse parties in the suit after Call, the original defendant, refused to perfect his appeal to the Supreme Court of the State.

It will be hard for the Court, in the light of the record, to escape the conclusion that the case was one gotten up for the purpose of repudiating this honest debt of Wilkes County.

Justice DOUGLAS, in his opinion of the said case of *Commissioners vs. Call*, 123 N. C., 308, concerning these Wilkes County bonds, said:

"The bondholders themselves *could* have become parties to any such proceeding, and *would* have been gladly heard by us, but the mere fact that *they deliberately refrained from any participation in the defense*," etc., etc.

The learned Justice thus shows that he did not believe from the record that Turner and Wellborn were *bona fide* holders of even one bond, or that they actually participated in the defense of the case in the State Court.

The Code also gave authority to issue these bonds.

In the order in which we have arranged this argument the complainants further contend that the issuance of the bonds is authorized under Sections 1996 and 1997 of the Code of North Carolina (Record, p. 38).

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883, (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

The bondholders are not estopped by the recital, in the face of the bonds, that they were issued under the provisions of the act of 1879, *provided it can be shown* that the commissioners of Wilkes county, in ordering the election and issuing the bonds, *acted also* under the provisions of sections 1996 and 1997 of the Code.

It is apparent that they did. They gave notice of exactly thirty days, the time required by section 1997 of the Code; the order speaks of the matter to be submitted as a "proposition," the word used in said section. *Besides, article 21 of the complaint declares that these bonds were, as a matter of fact,* issued under the provisions of these sections, as well as of the charter and the amendatory acts of 1868, 1879 and 1881. And article 21 of the answer does *not deny* this fact, but merely denies the *legal conclusions* arising from said admitted fact.

So it is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the acts set out in the record and under the charter. If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred the power to issue them on the board.

Knox Co. vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c., vs. Beal, 113 U. S., 227.

But the respondents contend that these sections did not authorize the issuance of the bonds for the following reasons:

I. "Because said statutes are not local and special as required by sections 1, 6 and 7 of the Constitution of North Carolina."

The conclusive answer to this is that there is not a particle of evidence of any kind to be found anywhere in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the State tax. But, further, under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid.*

" The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual" *(Cromartie vs. Commissioners,* 87 N. C. Reps., on p. 140).

And in *Herring vs. Dixon,* 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says: " In *Vaughn vs. Commissioners,* 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon* the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by section 6, article 5, of the Constitution.

But this argument is useless, as the record contains no evidence whatever that the payment of this obliga-

tion by the county will require a tax exceeding double the State tax.

Subscriptions to railroads, under General Statutes similar to section 1996, have been upheld by the Supreme Court of the United States:

"Where a State law confers a general power on a county to subscribe to the stock of any railroad in the State for any amount not exceeding $100,000, the county may subscribe to the stock of two railroads $100,000 each" (*Chicot County vs. Lewis*, 103 U. S., 164).

In *Davies vs. Huidekoper*, 98 U. S., 104, the court upholds a subscription under a General Statute of Missouri almost identical in language with section 1996.

The following are sections 1996 and 1997 of the Code of North Carolina:

Section 1996 of the Code of North Carolina.

"The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina.

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the

qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

Re the "interest of the citizens of the county."

The appellants further contend "that said sections of the Code failed to authorize the issue of said bonds, because said North Western North Carolina Railroad was not, within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the County of Wilkes had an interest."

Aside from the common sense of the matter, the grammatical construction of section 1996 forbids the interpretation put on it by appellants; to wit, that, before a vote could be taken by the citizens of Wilkes County, the said citizens must have a direct pecuniary interest in the road; that is, must be stockholders in the road. The words of the statutes are "in which the citizens of the county may have an interest."

The words are not "citizens of the county may have an interest," or "certain citizens," but "*the* citizens of the county."

So, if the pecuniary interest is meant, *every citizen* of the county must have stock before a county subscription could be voted, which is a *reductio ad absurdum*. But, if this was meant, the statute should have read, "in which the citizens of the county may

have interests." So that, assuming that this interest means a pecuniary interest, every citizen of the county must have stock, and that stock must be "an interest," or, in other words, that stock must constitute only one interest, one block of stock, owned in joint ownership by every citizen of Wilkes County—a palpable absurdity.

It is clear that the interest spoken of is the interest that the citizens of the county might have in any public improvement.

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant" *(Olcott vs. Supervisors*, 16 Wallace, 678*)*.

Re the "completion" required by the Code.

It is also objected by the attorney for the County Commissioners, "Nor was the subscription made necessary to aid in the completion of the same" [that is, the railroad].

The North Western North Carolina Railroad was begun to be built in October, 1868, and was finished to Winston, N. C., in 1872 or 1873; and, on November 6th, 1888, when the bonds were voted, work was going on on that part of the road from Winston to Wilkesboro. This fact is shown by affidavits in the record in the Circuit Court of Appeals, and omitted from certified record by mistake.

It will be admitted, however, by appellants' solicitors. Indeed, it is a matter of public notoriety.

The sections 1996 of the Code were first enacted into law April 10th, 1869, about six months after the work had been commenced on the North Western North Carolina Railroad.

The statute of April 10th, 1869, was re-enacted in Battle's Revisal and went into operation January 1st, 1874; it was again re-enacted in the present Code of North Carolina, and went into effect November 1st, 1883. So that, if the word "completion" be construed in its strictest sense, these bonds voted for on November 6th, 1888, were voted in aid of the completion of an unfinished road, of a road upon which the work of construction was going on on the very day these bonds were voted by the citizens of Wilkes.

"No reasonable construction of this act will require that the road to be aided should be actually built before the county was authorized to give it aid. That theory would, no doubt, add greatly to the security of the county and would relieve it from many of the perplexing questions which so commonly arise. If, however, the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished" (*Kenicott vs. Supervisors*, 16 Wallace, 452).

These objections to the giving of the power to the board to issue the bonds by sections 1996–2000 have been made by the county in Article 21 of their answer.

Another defense has been urged in and sustained by the State Court, to wit: That the provisions of section 1996 refer to only these roads that were *unfinished in April, 1868, the time of the adoption of the constitution of 1868.*

"This reasoning leads us to the still farther conclusion that, at the time when the act of 1868–9 was

brought forward in the Code, section 1996, and the four succeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868" *(Commissioners vs. Snuggs*, 121 N. C., on page 403, 1897*)*.

This was first decided in 1897 and is one of the most astonishing legal solecisms into which so able a court ever fell. The statute of April 10th, 1869, section 1996 of Code, made no refer ence to the Constitution of 1868, nor to any other point of time in the past. Every word in section 1996, denoting tense, is in the future tense, and the Code went into effect November 1st, 1883.

It is an universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary.

"No statute should be given a retrospective operation, unless its words expressly require such construction" *(State vs. Littlefield*, 93 N. C., 614*)*.

What words in section 1996 require that its operation be referred back to April, 1868, fifteen years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the subject), if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment! But this very principle has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case

a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this court held that companies thereafter organized were intended to be included, and the statute was applicable to them, as well as those then in existence. This court said (p. 160, 161):

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in section 1996, but the only words used were the adjectives, "incorporated and organized."

The cases relied on by the county's solicitors, concerning the power to tax, being conferred by special act, in answer to the contention on the part of complainants, that the commissioners had the power to issue the bonds under the sections of the Code, set out above, can have no application to a case of the kind at bar. The Supreme Court has said, in a late case, *City of Charlotte vs. E. D. Shepard & Co.*, 122 N. C., page 603, that "where such a corporation," speaking of a municipal corporation, "has thus acquired the right to create a debt, and issue the bonds, *this power carries with it*, the power to levy the taxes necessary to pay said bonds, and the accruing interest thereon" (*Ralls vs. County Court*, 105 U. S., 733; *U. S. vs. New Orleans*, 98 U. S., 381).

These sections of the Code, 1996 and 1997, are as much the law of North Carolina as any other sections of the Code are; they are as much the law as the Constitution itself is. In the *Stanly County case*, the

Circuit Court of Appeals, in 1899, held itself bound by the decision of the Supreme Court of North Carolina (*Commissioners vs. Snuggs*, 121 N. C., 401).

In the *Snuggs case* the Supreme Court upheld the sections of the Code referred to, deciding, however, that they did not apply, the road not being an unfinished road, and the citizens of the County not having an interest in the same.

Estoppel of the County by the recitals in the bonds.

In that case there was no pretense that any bondholder was a party, it being, as we contend, an *ex parte* proceeding. If any bondholder had been a party, the decision would have been different, because, in the body of the bonds issued by *Stanly County*, there was a recital that they were issued in pursuance of Sections 1996, &c., of the Code. This shows the corporate authorities acted with these provisions of the Code before them, and that they passed upon all questions left for their determination, as said by Justice BREWER in his opinion in *The Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

On page 307, Vol. 87 Federal Reporter, in the case of *Township of Ninety-six vs. Folsom*, the Circuit Court of Appeals, speaking through Judge JACKSON, says:

"It will be observed, from the inspection of these bonds, that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all

the conditions of the law were complied with, authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belonged to the authorities, who were authorized by the acts of the legislature to issue the bonds."

Purchasing these bonds, with the recitals they contained, was it required of the purchasers to find out whether the citizens of the county of Stanly had an interest in the railroad? Was it required of them to find out whether the railroad was completed or uncompleted? These were matters for the *corporate authorities*, and for them alone. Says Justice BREWER, in *Provident Trust Company vs. Mercer County*, 170 U. S. R., page 601:

"By a long series of decisions such recitals are held conclusive, in favor of a *bona fide* holder of bonds, that precedent conditions, prescribed by statute and subject to the determination of those county officers, have been fully complied with."

See, also, the recent important case of *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, as to the effect of recitals in bonds.

As we say, the decision would have been different if a bondholder had been a party, unless the Court had overruled the leading case of *Belo vs. Commissioners*, in which the rule as to the effect of the recitals in the bonds was laid down as stated by Justice BREWER in the *Mercer County case.*

The Supreme Court of North Carolina, in *Belo vs. Commissioners*, the leading case in that State upon the subject of municipal bonds, and the *effect of recitals in the bonds*, lays down the law as follows:

"While the decisions are very uniform that the record of the justices' court affirming the fact of compliance with the conditions precedent to the subscrip-

tion of stock is conclusive, and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves, that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has the right to rely on it (*Town of Coloma vs. Evans*, 92 U. S., Rep., 484; *Lynch vs. Winnebago*, 16 Wall., 13; *Knox county vs. Aspinwall*, 21 Howard, 539). In delivering the opinion of the Court in *Coloma vs. Evans*, Mr. Justice STRONG says: 'In the leading case of *Knox Co. vs. Aspinwall* the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it.'"

The foregoing are the words of Justice BYNUM in a decision which has never been departed from. Here the Supreme Court, in 1877, approved of the doctrine in the *Royal British Bank case* upon which *Knox vs. Aspinwall* was based.

When the Commissioners of the county of Wilkes acted under the power conferred in these two sections they construed them to mean what *they appeared to mean*. They had never been construed in North Carolina, and had been kept on the statute books of the State for nearly thirty years. The commissioners assumed that they were the judges of some of the matters named in these sections of the Code. They knew the road was an unfinished road, and while the recitals in the bonds did not embrace these sections of

the Code, as they did in the Stanly case, yet the board passed on the conditions, and assumed to act under the power here granted, as well as under the ordinance and the statutes before referred to in this brief.

All this shows the board acted with these provisions of the Code before them, and passed upon all questions left for their determination, as said by Justice BREWER in his opinion in the *Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

Relevant and controlling decision of the United States Supreme Court in favor complainants' contention.

In further argument of the questions and propositions certified in the record, and in support of complainants' contentions, we call attention specially to the case of *Township of Pine Grove vs. Talcott*, 19 Wall., 666, 677. That case was an action in the United States Circuit Court upon coupons cut from bond issued by that township in aid of a railroad, under an Act of the General Assembly of Michigan. The plaintiff in error insisted that several decisions of the Supreme Court of that State holding that the construction of railroads was not a public corporate purpose such as townships were authorized by the Constitution of Michigan to aid, and that such statute and the bonds issued in pursuance of it were void, were controlling.

The Supreme Court of the United States, in declining to be bound by those decisions, said:

"It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The Legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

And it was there decided, in the face of the Michigan cases, that aiding the construction of a railroad

was a corporate purpose of a township, and the bonds sustained.

The federal courts are courts of independent jurisdiction, and have always held that in questions of general law they will exercise their own judgment and try and determine cases according to their own views of the rights of the parties.

Among the questions held to be of this character, and in the decision of which they have repeatedly refused to follow and be controlled by State decisions in similar cases, the litigation in some instances growing out of statutory enactments of the State, *are all questions of commercial law, and those involving the validity of corporate securities, taxation, unrestricted legislative powers, corporate purposes and public uses,* questions of public policy, contracts of carriers, contracts of insurance companies, the respective duties of master and servant, and others of general application. We cite some of the cases in which this doctrine has been asserted:

Oates vs. National Bank, 100 U. S,, p. 246.
Swift vs. Tyson, 16 Peters, pp. 1–18.
Butz vs. City Muscatine, 8 Wall, p. 584.
Venice vs. Murdock, 92 U. S., p. 501.
Alcott vs. Supervisors, 83 U. S., p. 689.
Railroad Co. vs. Lockwood, 84 U. S., p. 368.
Burgess vs. Seligman, 107 U. S., p. 33.
Myrick vs. R. R. Co., 107 U. S., p. 109.
Pana vs. Bowler, 107 U. S., p. 541.
Railroad Co. vs. Baugh, 149 U. S., p. 372.
Pine Grove Township vs. Talcott, 86 U. S., p. 687.

The Federal Courts will not follow the decisions of State Courts construing their own constitutions and statutes, made after the rights sought to be enforced,

accrued and vested, when they are in conflict with the construction placed upon the same in the State before and at the time of the vesting of the rights.

This exception to the general rule of conformity is according to the law as it was construed to be, when the bonds were put on the market as commercial paper:

Again it is said by this Court :

" The same principle applies, where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Gelpcke vs. City of Dubuque, 1 Wall. p. 206.

These cases upon this subject are reviewed at great length and the doctrine reiterated, approved and enforced in a still later case to which we refer the court.

Taylor vs. Ypsilanti, 105 U. S., pp. 69–70.

The exception is not confined to *judicial* constructions, but applies to all cases of previous and contemporaneous construction, whether made by the people, the bar, or the several departments of the State government, so it becomes *general and is considered* settled law. In the case of *Olcott vs. Supervisors* (83 U. S., p. 690), it is said :

" This court has always ruled that if a contract when made was valid under the constitution and laws of the State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest

principles of justice. Parties have a right to contract and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting vs. Fon du Lac Co.*, is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the Supreme Court of the State decided that the uses for which testator was authorized by the statute of April 10th, 1867, were not public uses and therefore that the statute was invalid." The later decision was not followed.

In the case of *Pine Grove Township vs. Talcott* (86 U. S., pp. 677–78), above cited and quoted from, it appeared that the statute in question was enacted in 1869, the bonds issued the same year, and the adverse decision of the State Court made in 1870. There had been thirty similar statutes between 1863 and 1869, *but no judicial construction had been had of any of them.* The court refused to follow the subsequent State decisions and sustained the bonds, making use of the language quoted, *supra.*

And in a large number of other cases the opinions of attorneys-general, secretaries of State, and the various officers of the States and counties whose duty it was to pass upon, and administer the statutes in question, were held strongly persuasive of what the law was, and not to be departed from except in very extreme cases.

Comanche Co. vs. Lewis, p. 198.
Havemeyer vs. Iowa Co., 3 Wall., p. 303.
U. S. vs. Moore, 95 U. S., 763.
U. S. vs. Pugh, 99 U. S., 269.
Pease vs. Peck, 18 How., 596.

This *character of construction is as binding upon the courts as constructions by judicial decisions.* Judge COOLEY, in his work on Con. Lim., p. 82 (6th Ed.), says:

"Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight."

To establish judicial construction within the meaning of the rule under discussion, *cases deciding the very point at issue are not required.* In *Taylor vs. Ypsilanti* (105 U. S., p. 65), decisions holding that the manufacture of *salt was a public purpose*, and a bounty paid to encourage the same was constitutional, were held sufficient to settle the law of the State as to the character of statutes authorizing the city of Ypsilanti *to aid in the construction of a railroad.*

In an Illinois case, by way of illustration of what was a corporate purpose, the court said in its opinion that the establishment of a reform school would be one. Afterwards, this illustration was cited as declaring that a reform school was a corporate purpose of a county in Illinois, and followed and accepted as *evidence* of what the law of the State was at the time the

bonds then in question were issued, *in preference to later cases.*

Livingston Co. vs. Darlington, 101 U. S., p. 412.

In *Douglass vs. Pike County* (101 U. S., p. 680), (above cited, *ante*, p. 30), the earlier cases were followed in preference to later ones overruling them, *although the question upon which the bonds were held void was not raised or discussed in the first decisions, because the bonds were issued and sold under the declaration that the law of the State was as in those decisions stated, and the rights then acquired.*

It thus clearly appears that, at the time these bonds were issued and sold, the clause of the Constitution and statutes under consideration had received well-settled constructions favorable to the validity of the statutes, placed upon them by the Legislature in the enactment of numerous similar statutes, by the people in their long acquiescence, in legislation affecting nearly the whole State, by the favorable opinion of the bar, and impliedly, at least, by the decisions of the highest Court of the State.

This court will not now depart from this proper construction, and follow a late decision giving a different one to the statute, which defeats vested rights.

It is only well-settled and consistent decisions of the State Courts that the Federal Courts will follow; and to be authoritative and controlling in any case, the construction placed upon the State constitution or statute by the courts of the State must be settled and fixed so as to be incorporated itself with the statute and become one of property.

We cite some of the cases in which this doctrine has been announced.

Burgess vs. Seligman, 107 U. S., p. 33.
Thompson vs. Perrine, 103 U. S., p. 817.
Pana vs. Bowler, 107 U. S., p. 540.
Butz vs. Muscatine, 8 Wall., p. 583.
Pease vs. Peck, 18 Howard, p. 598.

In the case last cited it is said:

"There are, it is true, many *dicta* to be found in our decisions averring that the Courts of the United States are bound to follow the decisions of the State Courts on the construction of their own laws. But, although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to reseive and adopt it. * * * When the decisions of the State Court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, *some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent.*"

Stanly County Bond Case.

In view of the fact that the United States Circuit Court of Appeals for the Fourth Circuit is now holding under advisement a petition for rehearing in the case of certain *Stanly County*, North Carolina, bonds, already referred to, until the questions certified in this case are answered by this Court, we ask the Court's consideration of the argument contained in the petition of Coler & Co., also complainants in that case.

In this connection we call the attention of the Court to the order advancing this case for argument upon motion and petition of appellants. The order allows counsel for *Commissioners of Stanly County* and for *Town of Oxford* in the cases in the Circuit Court of Appeals, on petition for rehearing in that Court, to file briefs in support of their contention in these cases, the same to be considered in connection with the case at bar, for reasons set out in this petition.

We also call attention to the petition filed by appellants in the case at bar, and to that part of the same in which they allege it is desirable that the merits in the case be passed on by this Court.

The petition is as follows:

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The petition of W. N. Coler and Company, complainants in the above-entitled suit, prays this honorable court to rehear the above-entitled appeal, and to reconsider the decree and opinion therein rendered, and respectfully shows to this honorable court the reasons and grounds therefor as follows:

The petitioners understand from the reading of the opinion of his honor, Judge GOFF, filed on the 11th of August, 1899, that the Circuit Court of Appeals felt bound by the decisions of the Supreme Court of North Carolina rendered after the issue and sale of the bonds to complainants, who purchased them for value and without notice in good faith, and relying upon their being valid bonds of the county of Stanly, as set out in the bill. The cases to which the honorable court refer in the opinion filed are *Union Bank of Richmond vs. Commissioners of Town of Oxford*, 119 N. C., 214; 25 S. E., 966; *Board vs. Snuggs*, 121 N. C., 394; 28 S. E., 539; *City of Charlotte vs. Shepard* 120 N. C. 411; 27 S. E. 109; *Rodman vs. Town of Washington*, 122 N. C., 39; 30 S. E., 118; *Board vs. Call* (N. C.), 31 S.E., 481, in which case it was also held that sections 1996-2000 of the Code of North Carolina "authorizing county commissioners to subscribe stock

to a railroad company when necessary to aid in the completion of a railroad do not include a railroad not commenced before the Constitution of 1868 was adopted."

As your petitioners before averred, these cases were decided long after the sale of the bonds and purchase of the same in the year 1889. Your petitioners further aver that it appears from the reading of the opinion of this honorable court that its decision in the respect suggested is based upon the case of *Leeper vs. Texas*, 139 U. S., 462, 467, and upon the case of *Post vs. Supervisors*, 105 U. S., 667.

In the Leeper case there was a writ of error to a State Court, and in the Post-Supervisors case the writ of error was to the Circuit Court of the United States. The principles governing these two cases, as your petitioners aver, are laid down clearly by Justice GRAY in the case of *Central Land Company vs. Laidley*, 159 U. S. R., page 103, and by Justice PECKHAM, in *Turner vs. Wilkes County Commissioners*, 173 U. S., page 461.

In the Laidley case, on page 111, Justice GRAY says:

"The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a State Court which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana vs. Pillsbury*, 105 U. S., 273; in *Chicago Ins. Co. vs. Needles*, 113 U. S., 574; and in *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 486, or else the writ of error was to a Circuit Court of the United States bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State, as in *Gelpecke vs. Dubuque*, 1 Wallace, 175, 205; *Olcott vs. Supervisors*, 16 Wall., 678, 690; *Douglass vs. Pike County*, 101 U. S., 677, 686; *Anderson vs. Santa Anna*, 116 U. S., 356, 361, and other cases cited in *Louisiana vs. Pillsbury*, 105 U. S., 278, 295."

Your petitioners aver that the case at bar is an appeal to the Circuit Court of Appeals from a decree of a Circuit Court of the United States, "*bringing to this court the whole case, including the question how far the Courts of the United States should follow the decisions of the highest court of the State.*"

Your petitioners further aver that in the last number of the U. S. Reports, vol. 174, page 499, in the case of *Wade vs. Travis County*, this principle is discussed by Justice BROWN.

That Justice says, in the outset, the case involves "the weight to be given to alleged conflicting decisions of the Supreme Court of Texas as to the validity of the bonds."

The case was begun in the Circuit Court of the United States, and the judgment of the court was affirmed by the Circuit Court of Appeals. Upon plaintiff's petition for *certiorari* the writ was allowed, and the Supreme Court reversed the decisions of these courts, which were against the validity of the bonds, as being issued in violation of the Constitution of Texas, and adjudged that they were valid and legal bonds. On page 508 the Justice says:

"In determining what the laws of the several States are which will be regarded as rules of decision, we are bound to look not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." *Post vs. Supervisors* is one of the cases cited in support of this rule by the court.

"If there be any inconsistency in the opinions of these courts, the general rule is," adds the Justice, "that we follow the latest settled adjudications in preference to the earlier ones."

After laying down the general rule, as above, Justice BROWN says:

"One exception has been admitted to this rule, where, upon the faith of State decisions affirming the validity of contracts made, or bonds issued, under a certain statute, other contracts have been made or bonds issued, under the same statute, before the prior cases were overruled. Such contracts and bonds have been held to be valid upon the principle that the holders, upon purchasing such bonds, and the parties to such contracts, were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise would enable the State to set a trap for its creditors by inducing them to subscribe to bonds, and then withdrawing their security *(Gelpecke vs. Dubuque*, 1 Wall., 175*)*. Other cases are cited for this exception, including *Burgess vs. Seligman*, 107 U. S., 20."

Your petitioners further aver that what the state of the decisions is, in a court of highest jurisdiction, upon

a given subject, is a question of fact, to be passed on by the court in the first instance. And if, upon an examination of the cases, they *appear* to support a principle, the court will adjudge that there exists a certain course of decision for that period. If there are decisions which *appear* to support the principle upon which complainants, your petitioners, base their contention that the bonds in question are valid securities, it is to those decisions only that the court will look.

Your petitioners respectfully aver that his honor Judge GOFF, in his opinion in this case, uses the following words:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina inconsistent with the decisions of that court in the cases of *Union Bank of Richmond vs. Commissioners of the Town of Oxford* and *Board of Commissioners of Stanly County et al. vs. Snuggs, supra*, which had become rules of property, and which were overruled by these decisions, is not sustained by an analytical examination of the cases referred to, and, in our opinion, that court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned. It is true that, in some instances, the language used by the court is misleading in its tendencies, and even susceptible of the construction so placed upon it, but a careful consideration of the cases and the facts to which they relate forces the conclusion that the court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of Art. 2, section 14 of the Constitution of the State of North Carolina."

In the light of the above, your petitioners further aver that if the decisions relied on by complainants "*are susceptible of the said construction so placed upon*" them, this court, in favor of an innocent bondholder, relying upon that construction, and acting in good faith in the purchase of the bonds, will so construe the decisions as to uphold the securities.

The above comes directly within the rule laid down by Justice GRAY in *Louisville, &c., Ry. Co. vs. Louisville Trust Company*, 174 U. S. R., on pages 573 and 574. Justice GRAY says:

"In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated, as an axiomatic principle in the law

of corporations, this proposition: 'Where a party deals with a corporation in good faith the transaction is not *ultra vires* and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity, in fact, exists. If the contract can be valid, under any circumstances, an innocent party, in such case, has a right to presume their existence and the corporation is estopped to deny them' (10 Wall., 644, 645). The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* [1856], 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand*, as well decided upon its facts (*Knox County vs. Aspinwall*, 21 Howard, 539, 545; *Mofan vs. Miami County*, 2 Black, 722, 724; *Gelpecke vs. Dubuque*, 1 Wall., 175, 203; *St. Joseph vs. Rodgers*, 11 Wall., 644, 666; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited)."

The cases cited by Justice GRAY, in the above paragraph, are decided upon municipal bonds and show that the principle he states applies to contracts with municipal as well as to other corporations; and the late Justice MILLER, in his dissenting opinion in the case of *Humboldt Township vs. Long*, 92 U. S. R., pp. 650 and 651, says the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case on which the rule and principle are based, *is itself based upon The Royal British Bank vs. Turquand.*

Your petitioner respectfully avers that this court will adopt the view of this question, contended for by them, and, as said by Justice GRAY, if, "*under any circumstances,*" the bonds can be upheld and declared valid, this court will so adjudge.

Your petitioners further aver that, from their understanding of the opinion of the court in this case, it is based upon the view of the court that it is bound by the decision of the Supreme Court in the case *Board of Commissioners vs. Snuggs*, 121 N. C., 394, in its construction of sections 1996, 1997, 2000, which sections are among the recitals in the bonds in question. It

should be remembered that, in the above case, *no bondholder was a party*, and the decision is put upon the distinct ground that the sections of the code relied on do not apply, and do not confer the power upon the corporate authorities to issue such bonds *for the sole reason that it is not shown* the citizens of the county had an interest in the bonds and that the road was an unfinished railroad.

And, your petitioners aver, this court is not bound by this construction of these sections of the Code for the reasons set out in the foregoing paragraph of this petition. If a construction *can be placed* upon these sections, so as to uphold the bonds, this court will adopt that construction.

The Supreme Court of North Carolina, in *Belo vs. Commissioners*, 76 N. C. R., 489, the leading case upon the subject of municipal bonds and the *effect of recitals in the bonds*, lays down the law as follows:

"While the decisions are very uniform that the record of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves, that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it (*Town of Coloma vs. Evans*, 92 U. S., 484; *Knox County vs. Aspinwall*, 21 Howard, 539). Mr. Justice GRAY says: 'In the leading case of *Knox Co. vs. Aspinwall* the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, in a case in the Exchequer Chamber, which fully sustains it.'"

The foregoing, as your petitioners aver, are the words of Justice BYNUM in a decision which has *never been departed from*. Here the Supreme Court, in 1877,

approved of the doctrine in the *Royal British Bank case*, upon which *Knox vs. Aspinwall* was based.

If a bondholder had been a party to the case of *Board vs. Snuggs*, it is not to be supposed that the court would have decided the case as it did. They could not without overruling *Belo vs. Commissioners*. Whether the citizens had an interest in the railroad, and whether the railroad was finished, were matters to be passed on by somebody. There was no one else to pass upon them but the board of commissioners, named in the sections. As your petitioners aver, these were conditions, and it was not for the bondholder to come and ascertain whether they were complied with or not. All he had to do was to look to the recitals in the bonds.

For the reasons above set forth, the appellees respectfully submit to this honorable court their petition for a rehearing of the appeal in the case of *Board of Commissioners of Stanly county et al. vs. Coler & Co.*, and ask leave to reargue the same.

For the foregoing reasons we submit that the first and third questions certified should be answered "No," and the second question "Yes."

CHARLES PRICE,
Solicitor for Complainants.